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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-137

No. ~~1641~~

F. D. RICH COMPANY, INCORPORATED, a corporation, doing business in the State of Washington, and AMERICAN SURETY COMPANY,

Petitioners

v.

THE UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF ACME GRANITE & TILE COMPANY, a Division of Piper & Greenhalgh, Inc., a Washington corporation,

Respondents and Cross-Petitioners

and

B & G CONSTRUCTORS, INCORPORATED; FIREMEN'S FUND INSURANCE COMPANY, and UNITED STATES FIDELITY & GUARANTY COMPANY.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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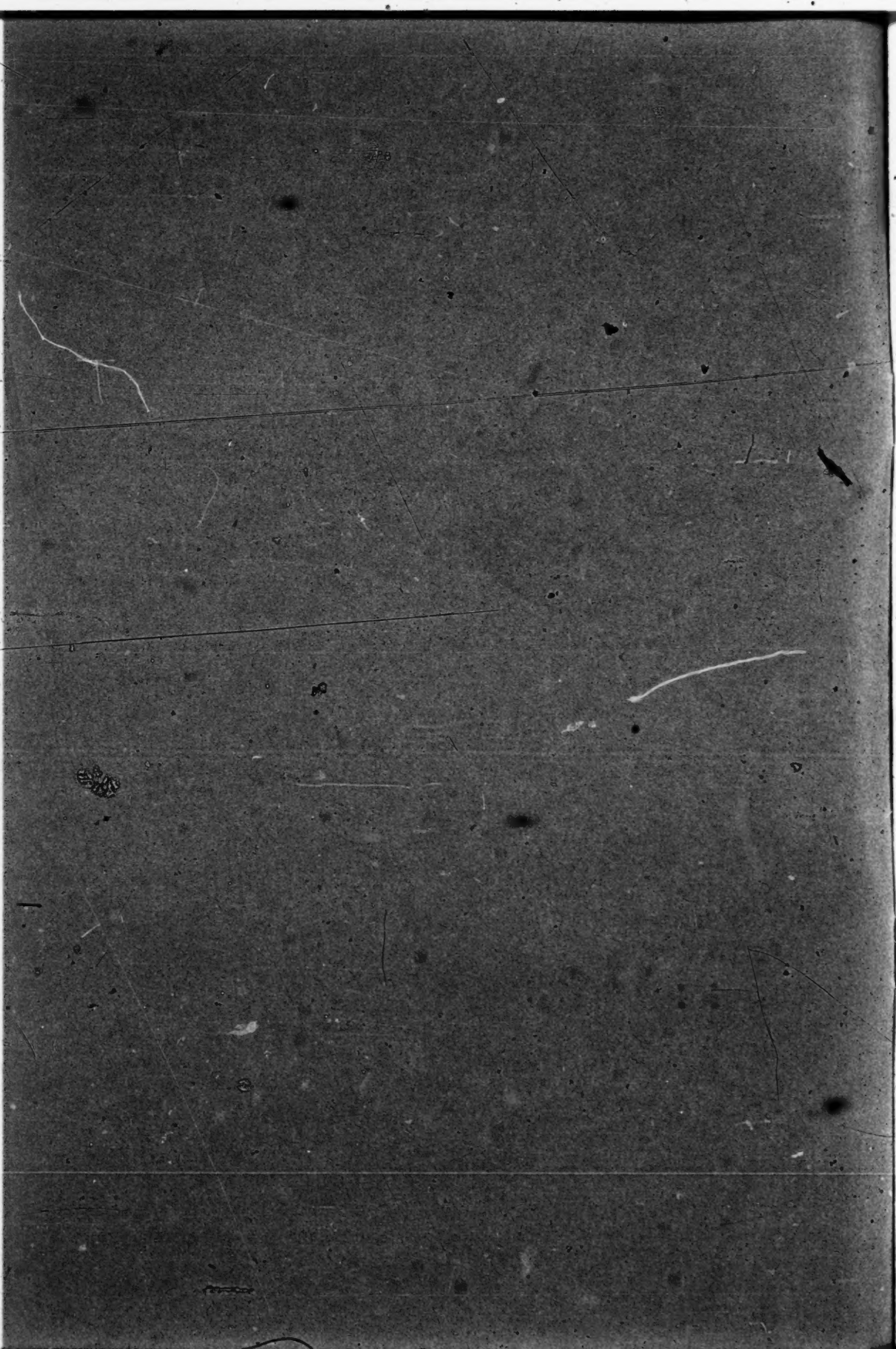

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Cross-Petitioners pray that a Writ of Certiorari issue to review judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on December 28, 1970, and oppose the Petition of F. D. Rich Company, Inc. and American Surety Company, Petitioners, which reached attorney for Cross-Petitioners on Wednesday, March 31, 1971.

OPINIONS BELOW

The District Court for the Western District of Washington delivered no written opinion aside from the Findings of Fact, Conclusions of Law, and Judgment entered in that court. The opinion of the Court of Appeals which reversed and remanded the judgment of the District Court is printed in the Appendix hereto at pages 1a thru 8a and is not yet reported in the official reports.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was made and entered on December 28, 1970, a copy of which Judgment is appended to this Petition on Page 10 of the index. Petitioners filed a Petition for Rehearing on February 1, 1971. On April 8, 1971, the Court of Appeals denied the petition for rehearing. The jurisdiction of this court is invoked under Rule 19, Jurisdiction on Writ of Certiorari, Supreme Court Rules.

QUESTION PRESENTED

The Opinion of the Court of Appeals for the Ninth Circuit on Page 6 Second Paragraph states:

> "We conclude that the judgment notwithstanding the verdict was error. This conclusion, however, does not permit us to reinstate the verdict.
>
> At the end of the case, the trial court granted an alternative motion for a new trial, to take effect *only* if the judgment n. o. v. should be reversed."

and, the Court of Appeals concluded:

> "A motion for a new trial is addressed to the

sound discretion of the trial judge, and must be left standing by this court absent a showing of abuse of discretion."

Cross-Petitioners believe that there was a showing of abuse of discretion by the District Court and the question is whether the jury's verdict should not have been ordered re-instated by the Court of Appeals as far as liability is concerned and judgment for the lien under the Capehart Act for $57,000 plus costs and interest, the amount of which was not contested by petitioners, and should not the Court of Appeals issue a mandate to the District Court requiring it to enter judgment also for the Respondents costs to date herein.

FEDERAL RULE INVOLVED

Title 28, Supreme Court Rules, PART V. JURISDICTION ON WRIT OF CERTIORARI:

(b) Where a Court of Appeals has rendered a decision . . . *or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."*

STATEMENT OF THE CASE

Respondents and Cross-Petitioners entered into a sub-contract with F. D. Rich Company, the petitioner above named, the prime contractor on a government contract for the construction of some 500 Capehart houses at Fort Lewis, Washington. Acme obtained a surety bond from Firemen's Fund Insurance Company and began work. The sequence of construction required the framing contractor, B & G Constructors, Inc., to frame the houses with

Acme to follow in each house with plaster and tile work.

Because of defective framing by B & G, the army inspector revoked his approval of certain houses on which Acme was working because the framing was out of plumb and parellel, rejected some 50 units and warned Acme that further plastering over defective framing would meet with similar rejection. Protests by Acme to Rich resulted in conferences and exchanges of letters. The quality of B & G's corrective measures was in dispute. An empasse developed and Acme refused to proceed. On March 11, Rich declared Acme in default and employed another tile contractor to finish the work. A new inspector was appointed by the Corps of Engineers to replace the engineer who had found fault with B & G's work.

Following Rich's termination of Acme's contract, Acme was ultimately forced into bankruptcy and liquidation. In the meantime, Acme brought an action against Rich asserting a lien claim for $57,446.46 in unpaid progress payments. Acme also asserted a claim later determined to be worth some $17,000 representing the value of the plastering, lathing and tiling work converted to Rich's use by Sunset after Acme's contract was terminated and a claim of some $100,000 in consequential damages resulting from Rich's "unjustified termination" of the contract. Rich counter-claimed against Acme for some $200,000 in increased labor costs.

At the conclusion of the trial, which generated 34 volumes of testimony, the jury returned a unanimous special verdict in favor of Acme.

Counsel for Rich filed alternate motions for Judgment N. O. V. and a new Trial and also filed a

motion to dismiss Acme's action on the ground that because the Acme corporation was dissolved while the litigation was in progress its action automatically abated under Washington law.

Counsel for Acme asserted the corporate dissolution was the result of a misunderstanding between counsel, the corporation's accountant and Acme's Trustee in liquidation. (A different lawyer than the lawyer of record for Acme in this case secured the corporate dissolution.)

Counsel for Acme immediately moved to substitute for the dissolved corporation the two partners who owned all of the stock in the corporation, (who had, before there was a corporate form of their business endeavor, been partners, that is, George Piper and Val Greenhalgh, doing business as Acme. The contract with the petitioner was taken in the name of Acme Granite and Tile Company and signed by Val Greenhalgh, not as President, but just as a person.)

Motion was denied and the court ordered Acme's action abated. All of these facts, but the sentences within parenthesis are contained on the second and third pages of the decision of the Court of Appeals, Appendix No.

The District Court held that the dissolution was a fraud upon the court. The trial court did this upon an affidavit made by Richard White, counsel for petitioner herein, which stated, among other things, that Greenhalgh had given his address as 10405 Bothell Way, Everett, Washington, and stated that he was an officer and director of Piper & Greenhalgh, Inc. and White goes on to say:

> ". . . although affiant was aware that Mr. Greenhalgh had purchased a ranch in British Columbia, I learned for the first time at the

> trial which commenced October 17, 1966, that Mr. Greenhalgh had taken up permanent residence at Ootsa Lake, British Columbia, Canada. Beacuse of the possible implications of Mr. Greenhalgh having moved to Canada upon collection of a judgment against him and/or his corporation, I requested my co-counsel, Mr. John E. Ederer, to telephone the Secretary of State in Olympia to ascertain the corporate status of Piper & Greenhalgh, Inc., and discovered the dissolution of plaintiff corporation."

Then White accused Greenhalgh of falsely stating in an affidavit for renewal of motion for Summary Judgment on August 9,:

> "That he was a majority stockholder in Piper and Greenhalgh, a Washington corporation, the above named plaintiff."

(Greenhalgh owned only 50 per cent, Piper the other 50 per cent, so the statement was technically incorrect by one share)

And, then counsel for Rich uses such ridiculous matters as the headings of different papers made out by counsel for Cross-Petitioners and Respondents herein, who at that time did not know of the dissolution of the corporation by Cooper & Cooper, attorneys at law in Everett, Washington; the headings being "Comes now the plaintiff, Acme Granite & Tile Company, a division of Piper & Greenhalgh, Inc.," and "Comes now the plaintiff," and on plaintiff's Demand to Produce, "Acme Granite & Tile Company," and "Comes now counsel for Acme Granite & Tile Company, a division of Piper & Greenhalgh, Inc." Even if counsel for Cross-Petitioners had know of the dissolution, there was no change in the title or heading of this action. White alleged that these matters were a fraud on the court

and that such statements had very serious consequences.

In oral arguments to the court, White incited the court to great anger by directly charging that Greenhalgh had moved to Canada in order, as the Judge said:

> ". . . to effectively shield themselves from the financial risk of this litigation." (Tr. 1716)

The court denied the motion of Piper and Greenhalgh to be substituted as the main parties in interest for the plaintiff corporation and the court went on to say further that if the matter were one within the equitable cognizance or discretion of the court, the motion should be denied

> "on the ground that said individuals dissolved the corporation with the intent of avoiding and evading liability on a possible judgment against the corporate entity and practiced a fraud upon the court and upon Rich, B & G and their respective sureities by failing to disclose the dissolution of the plaintiff corporation, although several occasions called for its disclosure."

The petitioners never produced any proof, whatsoever, to support the charges its counsel made to the trial court and which angered the court so much. In special transcript of proceedings on January 12, 1967, the court was asked if he had looked at the brief of plaintiff regarding plaintiff's motion to substitute Piper & Greenhalgh for the corporation, Piper & Greenhalgh, Inc. and the court said:

> "I am going to hear you orally about everything."

But, the court did not pay any attention to the many affidavits filed at that special hearing which begins on Page 1 of the special volume covering the

hearing on January 12, 1967, and ends on Page 19. The statements in the affidavits were never refuted or denied by petitioners or any attempt made to deny them, nor was there any proof except White's affidavit supporting the allegations therein, and neither did the court request any. The evidence at the hearing showed that the whole thing was a mistake and failure of communication between the trial attorney and the auditor in use of the word "liquidation" instead of "dissolution" of the brankrupt corporation. The oral evidence and the affidavits show that Greenhalgh and Piper owned the ranch at Ootsa Lake, British Columbia, a considerable time before they ever entered into this sub-contract with petitioner and that nothing by way of assets had been taken out of the State of Washington into British Columbia nor was there any intent to do so. Furthermore, testimony showed that Mr. Greenhalgh had not taken up permanent residence in British Columbia but still lived at 10405 Bothell Way, Everett, Washington, where his family was domiciled, and that George Piper lived in Seattle, Washington.

The evidence, records and affidavits showed the court that Acme Granite & Tile Company was bonded to the petitioners by a good and sufficient bond in Firemen's Fund Insurance Company, defendants herein, and who were named as defendants in the case in the very beginning.

White goes on to say in his affidavit:

> *"It would be manifestly unjust to permit Mr. Greenhalgh to benefit by his perjurous representations as to the continuing existence of the plaintiff corporation. It appears that the plaintiff concealed the dissolution of the corporation in order to avoid, if possible, payment of a*

judgment which might be entered herein in favor of defendants on their counter-claim."

There was just nothing in the record to show any such intent. Everything to the contrary, and the Court of Appeals in its decision found:

> *"In any event there is no evidence that the dissolution could have prejudiced Rich or that it was a fraud upon the court.* Firemen's Fund, as surety, is entitled to due process. The abatement of the action below appears under all the circumstances to have been unwarranted and prejudicial to Fireman's Fund as well as to Acme stockholders."

Despite that finding, the court of appeals does not think there was an abuse of discretion by the trial court in granting a new trial in the event his N. O. V. was overruled.

Let us go a little further. Both Piper and Greenhalgh, the testimony showed, as aforesaid, owned real estate and their homes in the State of Washington.

Then the trial court, prodded further by Rich, who told the court

> ". . . the record is barren of any evidence that Piper and Greenhalgh have any interest in the action,"

further found the dissolution to have been a deliberate fraud perpetrated by the Messrs. Piper and Greenhalgh to shield themselves from potential liability.

In the trial Judge's oral decision on Monday, March 13, 1967, he said, after charging that Greenhalgh and Piper were in contempt of court, the following:

> "This dissolution was knowingly and voluntarily affected by Mr. Greenhalgh and Mr.

> Piper as individuals. The court cannot escape the conclusion that one of the purposes of these individuals in causing the dissolution of Acme some months prior to trial of the case was to avoid possible personal liability of any adverse judgment that might result from this litigation or to prevent their assets, including those distributed to them in the dissolution proceedings, from being applied to the satisfaction of any judgment against Acme that might be entered in this case."

And then he went on to say that Mr. Greenhalgh and Mr. Piper *sought to effectively shield themselves from the financial risk of this litigation and by their action of that end denied themselves whatever benefits they might have derived from this law suit.*

Evitts, one of the representatives of Firemen's Fund Insurance Company, made an affidavit on file in record of special hearing on January 12, 1967, stating further that Greenhalgh and Piper had made an indemnity agreement to the Firemen's Fund covering any loss the Firemen's Fund might take on the contract involved in the case.

The trial court then stated:

> "That in the event it is finally determined that the trial of this case was without effect as to any phase of the liability issues between the parties due to the undisclosed dissolution of the plaintiff corporation the Government should be re-imbursed for expenses unnecessarily incurred in the trial. The court's records disclose that the jury's fees and expenses alone were in the sum of $2,825.10."

But, before this hearing on March 13, the court on January 12, 1967, stated:

> "The circumstances presented are of a grave and serious nature and it is desirable and the

> court now directs that they appear at the time of hearing with counsel prepared to advise the system in any way they think appropriate with respect to the development of the facts pertaining to the matter referred to."

And, the court went on to say that he thought this matter posed a very serious threat in the ordinary administration of justice and he could not overemphasize the fact that he considered the matters very serious apart from its relationship to the pending case.

At that time the hearing before the trial court assumed both a threat and the atmosphere of a criminal prosecution, although there was not one bit of evidence ever adduced, or that the petitioner ever tried to adduce, showing any attempt by Val Greenhalgh and George Piper to hide any assets or to remove any assets from the State of Washington to Canada and, of course, their surety bond and their indemnity agreements were completely disregarded by the trial court.

Not only that, but the trial court in a press conference with reporters from the Tacoma papers made statements to make it appear that Piper and Greenhalgh were little better than common criminals. Copies of the newspaper recording of this press conference are attached to the Appendix on pages 9a & 10a. We know that copies of these were not introduced in the trial because they were not known to exist at that time and they have only come to light after the appeal was started, but counsel for Respondents referred to it in his oral argument to the court of appeals.

This is a very unusual situation, as the Judge said to the newspaper men, that this had never happened to him in 40 years as an attorney and Judge.

(The trial was still proceeding). He told reporters how he ordered Greenhalgh and Piper to appear in court with their attorneys (notice the plural) which instruction caused Greenhalgh and Piper at great expense to employ separate attorneys, feeling that the court did not want their attorney then of record to represent them. Boldt finally told the newspaper men that he would rule on the motions March 13 before he considered the possible contempt of court. He pointed out that his decisions on the motion would determine whether or not he would proceed with the contempt of court allegation. He said he had charged contempt only three or four times in his history as a Judge.

The contempt of court charges are still on record and have not been dismissed by the trial court.

ARGUMENT

The Court of Appeals being very cautious and respectful as far as actions of the trial court was concerned, and should be, and probably not considering all of the consequences, ordered a re-trial, which, of course, would come up before the same trial judge. With such an attitude as the trial judge displayed during this special hearing on the contempt matter, and his failure to seek evidence to support the built-up and false accusations made by counsel for petitioners, makes it, we believe, patent that no sensible and prudent person would want to go back into that court if he could avoid it. Yet, cross-petitioners might have to because they lost everything in this legal process but have the jury's verdict and the ruling of the Court of Appeals to sustain them. There are numerous other fraudulent things as far as the petitioners and attorney for petitioners are concerned in the record.

Such as White's answer to an Interrogatory, as shown in cross-petitioner's brief, as to whether or not Rich had obtained any more money from the Government on Acme's work after the cancellation of Respondent's sub-contract, and then it was discovered that some way or other Rich got the Corps of Engineers to give somewhere around $100,000 more to the petitioner on this contract work, after they cancelled Respondent's sub-contract, although Rich had a good bond covering the original sub-contract and the Corps of Engineers was aware of it. The petitioner falsely represented to the Corps that Acme gave up the contract because it was underpriced. There was no evidence to that at all.

The trial court paid no attention to those things, but to the slightest mention of just the word "fraud" by Rich White, the court became highly incensed.

Therefore, cross-petitioners ask that the jury's verdict be ordered re-instated and that the Court of Appeals be instructed to add that to its mandate. Otherwise, a great miscarriage of justice will take place.

The author of this argument knows that courts and lawyers try to be very respectful to the bench and should be, but duty to one's client forces a member of the bar to ask the highest court in the land—in the interest of substantial justice—did not the District Court abuse its discretion in granting the motion made by the perpetrator of this fraud on the court, in setting aside the jury's verdict and granting a new trial *only* if his N. O. V. should be overruled?

Doesn't the orderly growth of the law require this Supreme Court of our land, in its obligation to su-

pervise the judicial proceedings of its inferior courts so that miscarriages of justice will not occur, to investigate matters of this kind and properly exercise its power of supervision?

May a trial court be so prejudiced against one of the litigants that he sets aside a jury's verdict in favor of that litigant and *then protects it* by summarily granting a new trial *only* in the event his judgment in favor of the other litigant is overruled?; not granting a new trial on any legal ground or because substantial justice was not done, but only if his judgment N. O. V. favoring the other litigant should be overturned? We are afraid this implies that if he is overruled, he wants another crack at it.

This is not very nicely stated, but the truth is often not pretty.

If petitioner should say to his Honorable Court that there is no precedent for hearing this kind of a cross-petition, then we ask the Supreme Court of the United States—isn't it about time that there is one?

If the court will read the briefs of the parties filed in the Court of Appeals, the court will learn about injustice in court—in a Federal Court!

Certainly the time has come to do something about this unfair situation, particularly when the cross-petitioners secured the unanimous verdict of the jury and with the exception of the granting of the new trial, a reversal from the Court of Appeals for the Ninth Circuit.

SPECIAL RESERVATION

The cross-petitioners herein especially reserve the right to submit a brief opposing the petition of

the petitioners filed herein. This cross-petition is not to be taken as an answer to the petition of the petitioners as such, and the cross-petitioners herein will submit at the same time the defendant, Firemen's Fund Insurance Company submits its brief, a brief opposing the granting of the petitioners' Writ of Certiorari.

CONCLUSION

With the above exception in mind, the cross-petitioners respectfully submit that the decision of the Ninth Circuit Court of Appeals was in error in concluding that a Motion for a New Trial should be granted and this court should grant a Writ of Certiorari applied for herein by the cross-petitioners.

Respectfully submitted,

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Attorney for Cross-Petitioners and Respondents The United States of America for the Use and Benefit of Acme Granite & Tile Company, a Division of Piper & Greenhalgh, Inc., a Washington corporation

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 23,744, 23,745, 23752, 23753

UNITED STATES OF AMERICA for the use of ACME GRANITE & TILE COMPANY, a Division of PIPER & GREENHALGH, INCORPORATED, a Washington corporation,

Appellant and Cross-Appellee,

v.

F. D. RICH COMPANY, INCORPORATED, a corporation, doing business in the State of Washington; B & G CONSTRUCTORS, INCORPORATED,

Appellees and Cross-Appellants,

AMERICAN SURETY COMPANY,

Appellee,

FIREMAN'S FUND INSURANCE COMPANY,

Appellant and Cross-Appellee,

and

UNITED STATES FIDELITY & GUARANTY COMPANY,

Appellee and Cross-Appellant.

[December 28, 1970]

Appeal from the United States District Court for the Western District of Washington, Southern Division

Before: HAMLEY and WRIGHT, Circuit Judges, and GOODWIN, District Judge.*

GOODWIN, District Judge:

In an action by a subcontractor for damages against the prime contractor on an army housing

* The Honorable Alfred T. Goodwin, District Judge for the District of Oregon, sitting by designation.

project, the subcontractor appeals from a judgment notwithstanding the verdict.

The district court separated the issues of liability and damages. The jury found in favor of the plaintiff subcontractor on the issue of liability. The damages issues were then referred to a special master, who computed damages. The court modified the master's findings and entered the challenged judgment in favor of the prime contractor notwithstanding the verdict in favor of the subcontractor. Both parties seek review of various trial court rulings.

The dispute arises out of a subcontract entered into by Acme Granite & Tile Company, a division of Piper & Greenhalgh, Inc., and F. D. Rich Company, the prime contractor on a government contract for the construction of some five hundred "Capehart" homes at Fort Lewis, Washington. (The project was funded pursuant to the Capehart Act, 42 U.S.C. §§ 1594-1594k.)

The subcontract specified that Acme was to "[f]urnish all labor, materials and equipment required to complete all lathing, plastering and ceramic tile work as per plans and specifications * * *." The work was to be spervised and approved by a designated representative of the U.S. Army Corps of Engineers. One provision of the subcontract required Acme to proceed with work on the written order of Rich regardless of any dispute about payment.

Acme obtained a surety bond from Fireman's Fund Insurance Company and began work. The sequence of construction called for a framing contractor, B & G Constructors, Inc., to frame the houses, with Acme to follow in each house with the plaster and tile work.

Because of defective framing by B & G, the Army inspector revoked his approval of certain houses on which Acme was working. The framing was out of plumb and not parallel. The engineer rejected some fifty units and warned Acme that further plastering over defective framing would meet with similar rejection.

Protests by Acme to Rich resulted in conferences and exchanges of letters. The quality of B & G's corrective measures was in dispute. An ampasse developed and Acme refused to proceed. On March 11, Rich declared Acme in default and employed Sunset Tile Company to finish the work. A new Corps of Engineers inspector was appointed to replace the engineer who had found fault with B & G's work. There were no more work stoppages.

Following Rich's termination of Acme's subcontract, Acme was ultimately forced into bankruptcy and liquidation. In the meantime Acme had brought an action against Rich asserting a lien claim for $57,446.46 in unpaid progress payments. Acme also asserted a claim later determined to be worth some $17,000 representing the value of the plastering, lathing and tiling work converted to Rich's use by Sunset after Acme's contract was terminated, and a claim for some $100,000 in consequential damages resulting from Rich's "unjustified termination" of the contract. Rich counterclaimed against Acme for some $200,000 in increased costs resulting from Acme's refusal to continue work, and brought B & G and its holding company into the action by asserting a third-party claim against them contingent upon Rich's own liability to Acme. B & G also asserted a claim against Acme for damages for delay allegedly caused by Acme.

At the conclusion of a trial which generated thirty-four volumes of testimony, the jury returned a special verdict in favor of Acme.

Counsel for Rich filed alternative motions for judgment n.o.v. and a new trial, and also filed a motion to dismiss Acme's action on ground that, because the acme corporation was dissolved while the litigation was in progress, its action automatically abated under Washington law.

Counsel for Acme asserted that the corporate dissolution was the result of a misunderstanding between counsel, the corporation's accountant, and Acme's trustee on liquidation. Counsel filed with the trial court a motion to substitute Acme's two sole stockholders, Piper and Greenhalgh, in place of the defunct corporation. This motion was denied, and the court ordered Acme's action abated.

The applicable Washington law then provided that dissolution of a corporation abated any action in which the dissolved corporation was a plaintiff. *United States* v. *Spokane Mill Co.*, 206 F. 999 (E.D. Wash. 1913). This law has since been changed, but the change has no retroactive force. See RCW 23A.28.250. The difficult question, however, is whether under Fed. R. Civ. P. 25(c) the motion to substitute parties, made by the two stockholders of the dissolved corporate plaintiff, should have been allowed by the district court.

A district court has ample discretionary power to substitute parties plaintiff where a corporate dissolution or some other act affecting the capacity to sue has occurred during the pendency of an action. *Brown* v. *Keller*, 274 F.2d 779 (6th Cir. 1960); *Feener Business Schools* v. *Spreedwriting Pub. Co.*, 249 F.2d 609 (1st Cir. 1957); *United States* v. *Koike*, 164 F2d 155 (9th Cir. 1947); *United States* v. *Hira-*

hara, 164 F.2d 157 (9th Cir. 1947); *Killebrew* v. *Moore,* 41 F.R.D. 269 (N.D. Miss. 1966); Fed. R. Civ. P. 25(c). Were it not for such a power of substitution, valuable property rights involved in litigation could simply disappear. Such a result would be at odds with both common sense and state law. See, e.g., *Ban-Mac, Inc.* v. *King County,* 69 Wash. 2d 49, 416 P.2d 694 (1966); *Taylor* v. *Interstate Inv. Co.,* 75 Wash. 490, 135 P. 240 (1913).

Under Washington law, the dissolution of a corporate entity does not necessarily relieve the corporation's assets or the stockholders who receive them from liability to its creditors. *Mayflower Realty Co.* v. *Security Savings & Loan Soc.,* 192 Wash. 129, 72 P.2d 1038 (1937); *State ex rel Everett Trust & Savings Bank* v. *Pacific Waxed Paper Co.,* 22 Wash. 2d 844, 157 P.2d 707 (1945).

Counsel for Acme argues strenuously that the dissolution was simply the product of a misunderstanding between himself and the accountant, and that he informed the trial court of the dissolution as soon as he knew of it himself. He also argues that because Acme was fully bonded Acme's stockholders had no motive to attempt to escape liability. Whether or not this last argument has merit, however, depends upon subrogation agreements and legal principles that have not been litigated below and are not before us. In any event, there is no evidence that the dissolution could have prejudiced Rich, or that it was a "fraud upon the court." Fireman's Fund, as surety, is entitled to due process. The abatement of the action below appears, under all the circumstances, to have been unwarranted and prejudicial to Fireman's Fund as well as to Acme's stockholders.

Protection of those beneficially interested in the floundering corporation was well within the equity powers of the court. *Bacon* v. *Robertson,* 59 U.S. 480 (1855). On all the facts of this case we are reluctantly compelled to conclude that the district court amused its discretion in denying the motion for a substitution of parties plaintiff and in leaving the corporation's surety vulnerable to a judgment on a counterclaim with no right of set-off.

The next question is whether entry of judgment notwithstanding the verdict was proper. We hold that it was not. The jury could reasonably have concluded that Acme's witnesses were telling the truth.

Questions as to the consistency and credibility of witnesses are obviously within the province of the jury. The fact that this court might reach a different result than the jury reached would not authorize us to affirm a judgment notwithstanding the verdict. Unless there is no substantial evidence to support the jury's conclusions, the verdict must stand, subject, of course, to the right of the district court to grant a new trial under Fed. R. Civ. P. 59.

We are not persuaded by Rich's argument that the only question involved in this case is the legal interpretation of the subcontract between Rich and Acme. Factual issues had to be resolved by a jury. It is true that Article V of the contract required Acme to proceed with work and not delay the whole project while it argued over compensation. But this provision of the contract may have been modified by the conduct of the parties. Also, the argument between the parties may not have been entirely a dispute over payment. In part, the dispute concerned the quality of performance and the impossibility of continued performance. In any event, there

was a question of fact whether Rich, by its failure to have B & G correct the defective framing job, prevented Acme from going ahead with its obligations under the contract. If Rich, through another subcontractor, prevented Acme's performance, Rich cannot be heard to complain of Acme's nonperformance, *Wolk* v. *Bonthius,* 13 Wash. 2d 217, 124 P.2d 553 (1942); *Mogul Logging Co.* v. *Smith Livesey Wright Co.,* 185 Wash. 509, 55 P.2d 1061 (1936); *Blair* v. *Wilkinson Coal & Coke Co.,* 54 Wash. 334, 103 P. 18 (1909).

Rich relies heavily on *Stoeckert* v. *United States,* 391 F.2d 639 (Ct. Cl. 1968), for the proposition that only legal questions are involved. However, in *Stoeckert,* the subcontractor refused to proceed with work in spite of the government inspector's urgent pleas that it do so. Here, the jury could have believed that the government inspector told Acme that its work would be rejected if Acme proceeded.

Something more than a legal interpretation of Acme's contractual duties, therefore, is involved in this case. A breach of contract by Rich may well have occurred before Acme refused to proceed. Reasonable men might differ as to which party first breached its obligation under the agreement and prevented the other from performing its duties. This is the kind of factual question that should be decided by the jury.

We conclude that the judgment notwithstanding the verdict was error. This conclusion, however, does not permit us to reinstate the verdict.

At the end of the case, the trial court granted an alternative motion for a new trial, to take effect only if the judgment n.o.v. should be reversed.

A motion for a new trial is addressed to the sound discretion of the trial judge, and must be left stand-

ing by this court absent a showing of abuse of discretion. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 247 (1940); and see cases in 6A Moore, Federal Practice § 59.08(5), pp. 3814-3821 (2d ed. 1966). No showing has been made that the district court abused its discretion in granting the motion for new trial. Therefore, under established rules of appellate review, we remand this case to the district court for a second trial in accordance with the order granting the motion for new trial.

Reversed and remanded.

Plaintiffs Face Court Contempt in Odd Case
Re-Typed from—
Tacoma News Tribune
February 28, 1967, Page A-2

Plaintiffs Face Court Contempt in Odd Case

Two plaintiffs in a civil action heard before a jury in U.S. District Court here have been ordered to appear before Judge George H. Boldt to show cause why they should not be held in contempt of court.

The order followed a hearing on post trial motions Monday in which it was revealed that the firm name in the action, Acme Tile and Granite Co., had been dissolved eight months before the beginning of the trial. The firm was owned by Val B. Greenhalgh and George D. Piper.

Judge Boldt said the situation was "highly unusual . . . a startling thing." He said, "This has never happened to me in 40 years as an attorney and judge."

Must Appear March 13

The judge ordered Greenhalgh and Piper to appear in court with their attorneys at 2:15 p.m. March 13 to show cause why they should not be held in contempt and why they should not be punished in the way of costs and expenses suffered by the United States in pre-trial, trial and post-trial matters.

Judge Boldt also is to rule on post-trial motions at that date.

A district court jury ruled in favor of Acme in the original case.

In that matter, Acme, a division of Piper and Greenhalgh, Inc., a Seattle firm, brought suit against F. D. Rich Co., Inc. of Stamford, Conn., and B&G Contractors, Inc., of Santa Ana, Calif.

Construction Contract

The case involved construction in a federal contract at Fort Lewis in which Acme and B&G were sub-contractors and Rich was the prime contractor. The jury was asked to rule on the issue of liability only and returned a verdict favoring Acme after 13 trial days. The fact that the firm had been dissolved was not mentioned during the trial.

In post-trial motions, the defendants moved for abatement of the action for judgment notwithstanding the jury verdict, or a new trial. Attorneys for Acme moved to substitute the operators, Piper and Greenhalgh, in place of the corporation.

Judge Boldt said he will rule on the motions March 13 before he considers the possible contempt of court. He pointed out that his decisions on the motions will determine whether or not he will proceed with the contempt of court allegation. He said he has charged contempt only three or four times in his history as a judge.

The judge said the two and a half week trial, which ended Nov. 2, involved a "considerable expense" to the government.

Construction Damage Suit Dismissed
Re-Typed from—
Tacoma News Tribune
March 14, 1967, Page C-11

Construction Damage Suit Dismissed

A jury verdict in an unusual civil action in U.S. District Court was set aside Monday by Judge George H. Boldt.

The judge ruled that Acme Tile and Granite Co., a Seattle firm, was dissolved eight months before a suit was brought in its name against F. D. Rich & Co., Inc., of Stamford, Conn., and B&G Contractors, Inc., of Santa Ana, Calif.

The judge also delayed a decision on a show-cause order against Val B. Greenhalgh and George D. Piper, owners of Acme, a division of Piper and Greenhalgh, Inc. The order asked why the two men should not be held in contempt of court.

A district court jury had ruled in favor of Acme in the original case. The judge set aside the judgments against the defendants Monday and dismissed the claims.

Judge Boldt said there are grounds for a new trial. He recessed the court, subject to call. The judge delayed decisions on other post-trial matters pending possible appeal of the case.

The original case involved construction in a federal contract at Fort Lewis in which Acme and B&G were sub-contractors and Rich was the prime contractor. The jury had been asked to rule on the issue of liability only and had returned a verdict favoring Acme.

The judge said examination of trial testimony indicated the fact that Acme had been dissolved had not been mentioned.

Judge Boldt said the state's corporation laws do not allow deceased corporations to be revived for pending litigation. He said the court is not empowered to overrule these laws.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1611~~ 70-137

F. D. RICH COMPANY, INCORPORATED, a corporation, doing business in the State of Washington, and AMERICAN SURETY COMPANY, *Petitioners,*

v.

THE UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF ACME GRANITE & TILE COMPANY, a Division of Piper & Greenhalgh, Inc., a Washington corporation,
Respondents and Cross-Petitioners

and

B & G CONSTRUCTORS, INCORPORATED; FIREMEN'S FUND INSURANCE COMPANY, and UNITED STATES FIDELITY & GUARANTY COMPANY.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR CROSS-RESPONDENTS F. D. RICH COMPANY, INCORPORATED AND AMERICAN SURETY COMPANY IN OPPOSITION

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That opinion is printed in the Appendix hereto at pages 1a-2a and is not yet reported in the official reports.

JURISDICTION

Cross-respondents do not dispute cross-petitioner's jurisdictional statement except insofar as cross-petitioner invokes Rule 19 of the Supreme Court Rules as the basis for jurisdiction of this Court. Rule 19 of the Supreme Court Rules does not confer jurisdiction upon this Court to review a judgment by writ of certiorari but rather sets forth the considerations governing review on certiorari. Jurisdiction of this Court should have been invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals was correct in affirming the District Court's order granting cross-respondents' motion for new trial.

FEDERAL RULES INVOLVED

The question presented in the cross-petition involves Rules 50 and 59 of the Federal Rules of Civil Procedure. The pertinent portions of Rule 50 are as follows:

Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict

* * *

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved

for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; . . . . A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative . . . .

(c) Same: Conditional Rulings on Grant of Motion.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

The pertinent portion of Rule 59 is as follows:

Rule 59. New Trials; Amendment of Judgments

(a) *Grounds.* A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; . . .

COUNTERSTATEMENT OF THE CASE

This action was instituted by Piper & Greenhalgh, Incorporated, a subcontractor on a federal defense housing project contract, for damages, and included sizable counterclaims and cross-claims by F. D. Rich Company, Incorporated (hereinafter Rich) and B & G Constructors, Incorporated (hereinafter B & G). It stems from contractual disputes experienced during construction of a 500-unit housing project for military personnel at Fort Lewis, Washington in 1962-1963. The general contractor, Rich, undertook with the United States to construct the project in 540 calendar days for $7,664,827.

The controversy centers on termination by Rich of its lathing, plastering and tiling subcontractor, Acme Granite & Tile Company, a division of Piper & Greenhalgh, Incorporated, following the latter's refusal to continue its work on the project. Piper & Greenhalgh, Incorporated's only claimed justification was its dissatisfaction with the condition of framing installed by B & G and its fear that the Corps of Engineers, which acted for the Government, might reject its work. Rich strove, without success, to pursuade Piper & Greenhalgh, Incorporated to return to work. Finally, Piper & Greenhalgh, Incorporated was terminated and Rich employed Sunset Tile Company to repair defects in Piper & Greenhalgh, Incorporated's work and to complete performance of the latter's unfinished work. Sunset completed the work promptly without major incident.

By agreement the issues of liability and damages were severed. Trial of the liability issues was to a jury. Cross-respondents moved for a directed verdict

at three stages of the trial, first at the close of the plaintiff's case, second at the close of the evidence, and third after the jury had been charged. The District Court expressed serious doubt as to whether any real fact issue existed:

> I think there are very serious questions concerning the merits of this motion, and we will have more time to consider it at a later time. (Liability Transcript 1599)

The District Court denied the motion for directed verdict and submitted the matter to the jury, subject to its later review. The jury returned a verdict in favor of Piper & Greenhalgh, Incorporated and against cross-respondents, B & G and B & G's surety.

Cross-respondents renewed their motion post-trial in the form of a motion for judgment notwithstanding the verdict and, in the alternative, moved for a new trial. The District Court directed that the testimony of all key witnesses be transcribed and called for briefs to be written in the same style as appellate briefs, with complete record references. With this perspective and after full argument, the District Court granted cross-respondents' motion for judgment notwithstanding the verdict and their alternative motion for new trial. He stated:

> At the conclusion of the evidence, the Court had grave doubts of the sufficiency of the evidence to sustain a negative answer by the jury to any one of the Sections 1(a), (b), and (c), 2 and 3 of the verdict form. Since the verdict, the transcribed evidence has been closely examined in the light of the controlling authorities and the applicable principles of law. The Court's doubt at the end of the evidence now has become a conviction.

> The Court finds and holds there was not a scintilla of evidence to support the jury's negative answer to the verdict sections referred to. Under the facts and circumstances shown without conflict in the evidence, affirmative answers to those sections were and are required as a matter of law. The evidence is clear and uncontradicted that Acme, without reasonable excuse or legal justification, refused to proceed with its contract work when directed to do so by Rich pursuant to valid and enforceable contract provisions. (Liability Transcript 1708-1709)

These conclusions were formalized in an order (Record 1442-1447) and ultimately were reflected in the judgment from which appeal was taken (Record 2620-2625). In the order granting the motion for new trial, the District Court stated:

> That the motion by Rich, American Surety Company, B & G, and United States Fidelity & Guaranty Company for new trial be and the same is hereby granted as against both Acme and Fireman's Fund, on the ground that the verdict and all of the jury's responses to special interrogatories were in all respects contrary to law and against the weight of the evidence. (Record 1446)

On Appeal to the Court of Appeals, Piper & Greenhalgh, Incorporated assigned error to the District Court's ruling granting a new trial. However, nowhere in either its opening brief or its reply brief did it even discuss the issue. The Court of Appeals, while reversing the judgment notwithstanding the verdict, affirmed the District Court's order granting the motion for new trial. It stated:

> A motion for a new trial is addressed to the sound discretion of the trial judge, and must be left standing by this court absent a showing of

abuse of discretion. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 247 (1940); and see cases in 6A Moore, Federal Practice § 5908 (5), pp. 3814-3821 (2d ed. 1966). No showing has been made that the district court abused its discretion in granting the motion for new trial. Therefore, under established rules of appellate review, we remand this case to the district court for a second trial in accordance with the order granting the motion for new trial. (Appendix of Cross-Petitioner, pp. 7a-8a)

ARGUMENT

Cross-petitioner has completely failed to establish any reason why this Court should grant the cross-petition for writ of certiorari. The sole issue upon which cross-petitioner seeks review is whether the Court of Appeals departed from the accepted course of judicial proceedings, or sanctioned such departure by the District Court, in affirming the District Court's order granting cross-respondents' motion for new trial. However, cross-petitioner does not even summarize the proceedings in either the District Court or the Court of Appeals relating to that issue. It fails to point out that it did not even argue the issue in the Court of Appeals. Cross-petitioner does not even discuss the applicable court rules, Rules 50 and 59 of the Federal Rules of Civil Procedure. It is unable to cite any case even claimed to support its petition.

The only authority cited by cross-petitioner is Rule 19 of the Rules of the Supreme Court which sets forth the considerations governing review on writ of certiorari. Included as indicating the character of reasons which will be considered is:

> Where a court of appeals . . . has so far departed from the accepted and usual course of judicial pro-

> ceedings or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

The manner in which the Court of Appeals is contended to have sanctioned a departure by the District Court from the "accepted and usual course of judicial proceedings" is described by cross-petitioner as follows:

> May a trial court be so prejudiced against one of the litigants that he sets aside a jury's verdict in favor of that litigant and *then protects it* by summarily granting a new trial *only* in the event his judgment in favor of the other litigant is overruled?; not granting a new trial on any legal ground or because substantial justice was not done, but only if his judgment N.O.V. favoring the other litigant should be overturned? We are afraid this implies that if he is overruled, he wants another crack at it. (Italics included) (Cross-petition, p. 14)

That contention is unfounded.

In ruling on both the motion for judgment notwithstanding the verdict and motion for new trial, the District Court, rather than departing from the "accepted and usual course of judicial proceedings", was following the procedure specified in Rule 50(b) and (c) of the Federal Rules of Civil Procedure. Rule 50(c) provides that if a motion for judgment notwithstanding the verdict is granted,

> . . . the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. . . .

The procedure was approved by this Court in *Montgomery Ward & Co.* v. *Duncan,* 311 U.S. 243 (1940):

> If alternative prayers or motions are presented, as here, we hold that the trial judge should rule on the motion for judgment. Whatever his ruling thereon, he should also rule on the motion for a new trial, indicating the grounds of his decision. . . .

The District Court was, therefore, *required* to rule on the alternative motion for new trial. It did so rule, granting cross-respondents' motion on the ground that the verdict was "contrary to law and against the weight of the evidence." (Record 1446).

Nor did the Court of Appeals depart from the "accepted and usual course of judicial proceedings". On the contrary, it applied the established rules concerning appellate review of an order granting a new trial. The Court of Appeals cited this Court's decision in *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 247-248 (1940), where it was stated:

> Hence this case falls within the well established rule that neither this Court nor the Circuit Court of Appeals will review the action of a federal trial court in granting or denying a motion for a new trial for error of fact, since such action is a matter within the discretion of the trial court. Fairmount Glass Works v. Cub Fork Coal Co. 287 US 474, 77 L ed 439, 53 S Ct 252. Certain exceptions have been noted, such as instances where the trial court has "erroneously excluded from consideration matters which were appropriate to a decision on the motion." Fairmount Glass Works v. Cub Fork Coal Co. supra (287 US 483, 77 L ed 444, 53 S Ct 252). But there are no such circumstances here.
>
> * * *

> Certainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review. Moore v. United States, 150 US 57, 61, 62, 37 L ed 996, 998, 14 S Ct 26; J. W. Bishop Co. v. Shelhorse (CCA 4th) 141 F 643, 648; O'Donnell v. New York Transp. Co. (CCA 2d) 187 F 109, 110. In substance no more than that is involved here.

It also relied upon 6A Moore's Fed. Prac. (2nd Ed. 1966) 3814-21, § 59.08[5] where the rules governing appellate review are discussed at some length. Criteria for review are stated as follows at page 3820:

> What review, if any, may be had of the trial court's grant or denial of a motion for new trial on the ground that the verdict is against the weight of the evidence? None, as a general proposition; and this is in keeping with the usual principles that new trial rulings are, subject to certain narrow exceptions, non-reviewable. The motion for a new trial on the ground that the verdict is against the weight of the evidence is addressed to the sound discretion of the trial court. Unless the motion is not timely so that it has no power to act thereon, the trial court must exercise its discretion; and hence a failure so to do is reviewable. Accordingly, the grant or denial of the motion under the compulsion of a mistake of law is reviewable. But assuming that the court has the power to consider the motion and does exercise its discretion its error in granting or denying the motion, if any, is usually one of fact and non-reviewable. Under unusual or special circumstances the trial court's action may constitute an abuse of discretion and be reviewable, but rarely can this be shown.

The Court of Appeals held that no showing had been made that the District Court abused its discretion. That holding was clearly correct.

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

[Filed April 8, 1971]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 23,744, 23,745, 23,752, 23,753

United States of America for the use of Acme Granite & Tile Company, a Division of Piper & Greenhalgh, Incorporated, a Washington corporation,
Appellant and Cross-Appellee,

v.

F. D. Rich Company, Incorporated, a corporation, doing business in the State of Washington; B & G Constructors, Incorporated,
Appellees and Cross-Appellants,
American Surety Company,
Appellee,
Fireman's Fund Insurance Company,
Appellant and Cross-Appellee,
and
United States Fidelity & Guaranty Company,
Appellee and Cross-Appellant.

Opinion on Petition for Rehearing

Before: Hamley and Wright, Circuit Judges and Goodwin, District Judge.*

Per Curiam:

In a petition for rehearing, F. D. Rich Company, Incorporated, urges that this court has erred in the application of state law.

---

* The Honorable Alfred T. Goodwin, District Judge for the District of Oregon, sitting by designation.

As noted in our opinion of December 28, 1970, Washington law provided when the case was tried in the District Court that the dissolution of a corporation abated any action in which the dissolved corporation was a plaintiff. Washington law with reference to the rights of creditors and shareholders of dissolved corporations makes it clear, however, that even though a procedural rule formally abated a pending action in the state court, the rights of shareholders and creditors were not necessarily obliterated by the dissolution of the corporate entity. *Mayflower Realty Co.* v. *Security Savings & Loan Soc.*, 192 Wash. 129, 72 P.2d 1038 (1937); *State ex rel. Everett Trust & Savings Bank* v. *Pacific Waxed Paper Co.*, 22 Wash. 2d 844, 157 P.2d 707 (1945).

As noted in our opinion of December 28, 1970, the District Court was not bound by the procedural law of the State of Washington, but was bound by the Federal Rules of Civil Procedure. Under the Federal Rules, it is clear that the District Court had ample authority to dispose of the case on its merits by the substitution of parties if necessary.

There is no conflict between our opinion and the substantive law of the State of Washington. There is some federal case authority prior to 1938, when the Conformity Acts were still in force, which supports the petitioner's view that certain local procedural laws apply in the district court. See *Oklahoma Gas Co.* v. *Oklahoma*, 273 U.S. 257, 259-60 (1927) (dictum); *United States* v. *Spokane Mill Co.*, 206 F. 999 (1913). These cases have been rendered obsolete by the adoption of the Federal Rules of Civil Procedure.

We adhere to the views expressed in the original opinion. The petition for rehearing is denied.